APR 29 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 1024

CHARLES T. RULE,

Petitioner,

vs.

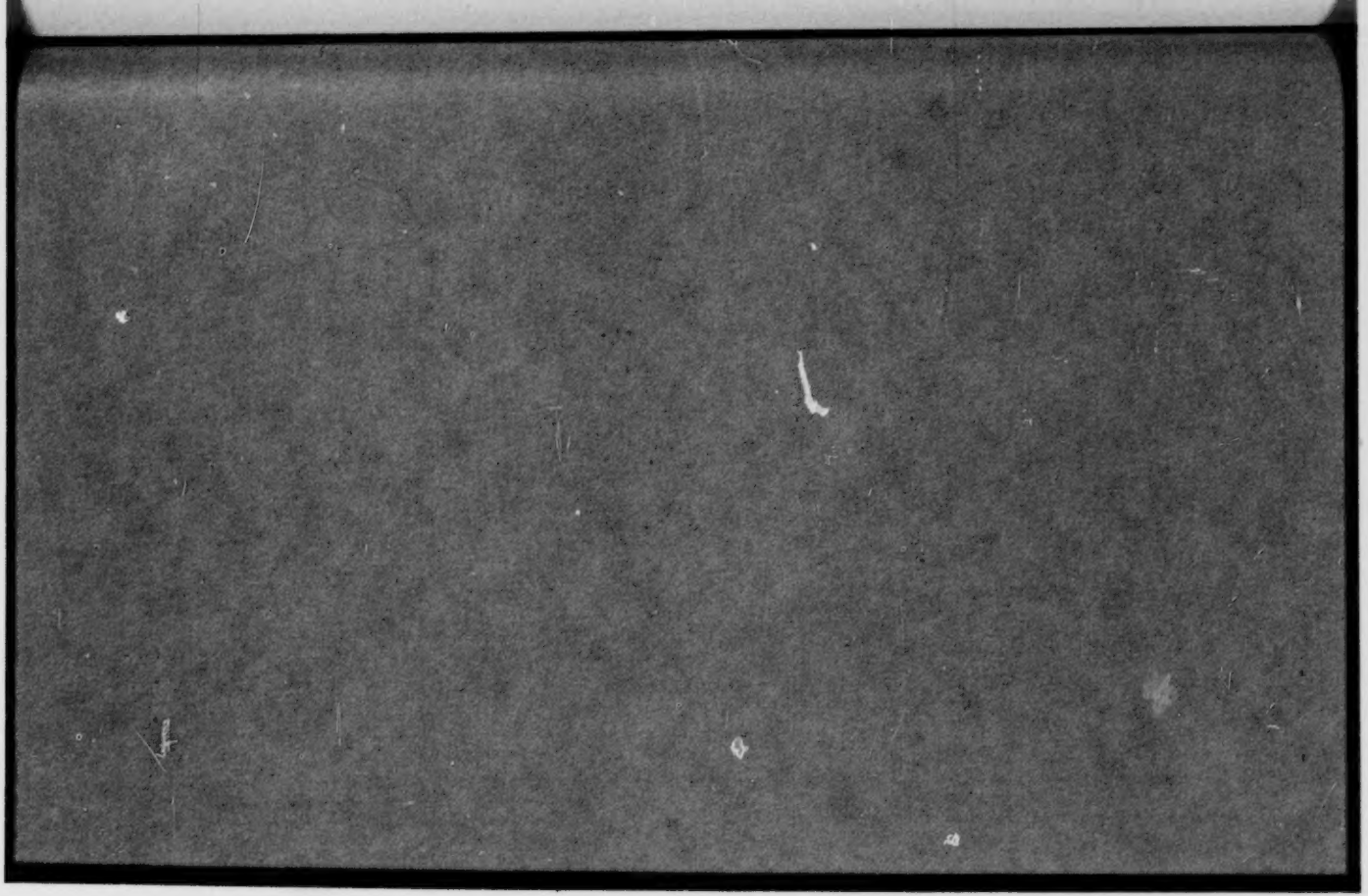
HATTIE SEARS, EDWIN E. WEBER, MINNIE LOUISE MATTOCKS, *et al.*

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

PIERCE WORKS,
900 Title Insurance Building, Los Angeles 13,
Counsel for Respondents.

EDWIN J. MILLER,
RALPH W. MILLER,
HOWARD E. FORRESTER,
Of Counsel.

Parker & Company, Law Printers, Los Angeles. Phone TR. 8205.



SUBJECT INDEX.

PAGE

I.

The case as made below and as treated by the Supreme Court of California on the appeal..... 2

II.

Petitioner has had his day in court upon the issue of a collateral or secret agreement to create a trust and upon every other issue involved in the case, including that of extrinsic fraud.... 5

III.

Petitioner acquired no vested rights under the decree of distribution, for the Probate Court was without jurisdiction to declare the equities under which respondents claimed, as held by the California Supreme Court..... 15

TABLE OF AUTHORITIES CITED.

CASES. PAGE

Bjornquist v. Barton & A. R. Co., 250 Fed. 929; cert. den. 248 U. S. 593 14
Bryant, Estate of, 3 Cal. (2d) 70 19
Curdy v. Berton, 79 Cal. 420 17
Davey v. So. Pacific Co., 116 Cal. 325 14
Gillette v. Gillette, 122 Cal. App. 640 16
Hubbell, Estate of, 121 Cal. App. 38 ..... 15, 16
Martin v. Imbrie, 262 Fed. 44 13
McLellan, Estate of, 8 (2d) 49 15
Fleishacker v. Blum, 109 F. (2d) 542; cert. den. 311 U. S. 665 14
Houle v. Helena Gas & Elec. Co., 31 F. (2d) 671 14
Lauricella v. Lauricella, 161 Cal. 61 17
Lyons v. Empire Fuel Co., 262 Fed. 465 14
Parkman v. Superior Court, 77 Cal. App. 321 15
Peck v. Noee, 154 Cal. 351 14
Prior v. Andrews, 83 Cal. App. 782 17
Rey, Estate of, 31 Cal. App. (2d) 648 16
San Juan Light Co. v. Requena, 224 U. S. 89, 32 Sup. Ct. 399, 56 L. Ed. 680 14
Sears v. Rule, 45 Cal. App. (2d) 374 5

STATUTES.

California Code of Civil Procedure, Sec. 1699 15
California Constitution, Art. VI, Sec. 4½ 14
California Constitution, Art. VI, Sec. 5 15
California Probate Code, Secs. 300-1242 15
California Probate Code, Sec. 1120 ..... 15, 16

TEXTBOOKS.

2 California Jurisprudence, p. 240 14
2 California Jurisprudence, p. 809 14
Restatement of the Law of Trusts, Sec. 54d 4, 18
Restatement of the Law of Trusts, Sec. 55h 4, 18
Restatement of the Law of Trusts, Sec. 411q 4, 18
1 Scott on Trusts, p. 312 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 1024

CHARLES T. RULE,

Petitioner,

vs.

HATTIE SEARS, EDWIN E. WEBER, MINNIE LOUISE MATTOCKS, *et al.*

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

It is respectfully submitted that the petition for certiorari herein should be denied.

Under petitioner's Point 1 it is claimed that he has been unconstitutionally deprived of his day in court because, it is said, the California Supreme Court discarded the "theory and cause of action" presented and relied upon below and substituted "a new and different" theory and cause of action which has never been the subject of judicial inquiry or determination.

Under his Point 2 it is claimed that in any event the California Supreme Court unconstitutionally deprived him of the property vested in him by the earlier decree of the probate court by giving the property (distributed outright to him by the probate court) to persons other

than the beneficiaries under the collateral agreement declared by it to be the basis of its decision and without judicial inquiry into the validity, purposes, terms or beneficiaries of such "purported" agreement or of any trust resulting therefrom.

Neither point possesses merit. In order adequately to answer them, however, it will be necessary to devote some attention to the case as made below, and to the California Supreme Court's treatment of it on the appeal.

I.

The Case as Made Below and as Treated by the Supreme Court of California on the Appeal.

The case pleaded, proved and found in the trial court showed (1) that plaintiffs and cross-complainant Cotton (we shall hereinafter refer to these parties collectively as "respondents") were heirs-at-law of the decedent Sarah E. Weber; (2) that the latter left a will; (3) that although the will named petitioner Rule as sole residuary devisee, *it was not the intention of the decedent that he should take outright, but that he should take for undisclosed persons previously agreed upon between them;** (4) that petitioner denied having made any such agreement and claimed the assets of the estate for himself; and (5) that by divers and extrinsic frauds and concealments, not necessary here to be detailed, he prevented respondents from presenting their claims to the probate court, thus procuring distribution to himself outright.

---

*This is the issue as to which petitioner asserts he has never had his day in court. We shall show, by adequate record citations, that the issue has been present from the beginning, to the knowledge of petitioner and his counsel.

Judgment going against him, petitioner appealed and relied most strongly upon the proposition that the decree of distribution was *res adjudicata* and as such could not be avoided except for extrinsic fraud. (See, for example, Vol. 10 herein, Apps. Reply Brief in 2d Civil No. 14280, pp. 3-8.)

When the case arrived in the Supreme Court of California, that court held that the decree of distribution was not *res adjudicata* (for want of jurisdiction in a California probate court to adjudicate equitable claims such as are here involved) and, hence, the decree not being binding, there was no necessity for passing upon the sufficiency of the evidence to support the findings as to extrinsic fraud. [R. 302-303.] It then proceeded to hold that upon the other facts found, and specifically the facts concerning a collateral agreement on the part of petitioner to distribute to unnamed and unascertained beneficiaries, a constructive [or *resulting:* compare R. 299, 303] trust arose for the benefit of the heirs at law of the decedent, namely, these respondents. [R. 302-303.]

The result is that petitioner is in reality here claiming no more than that the California Supreme Court erred, in the exercise of its jurisdiction under California law, in holding that the probate decree of jurisdiction was not *res adjudicata* and hence that the issue as to the presence or absence of extrinsic fraud as a vehicle for avoiding the decree was wholly immaterial. But what petitioner industriously ignores is the patent fact that the holding of the California Supreme Court (that a decision upon the question of extrinsic fraud was unnecessary) merely emphasizes the presence from the beginning of the essentials of the cause of action upon which the respondents were permitted to recover.

Ignoring, as we may, for purposes of reality, the actual order in which the issues were presented, the relative claims of the parties were these:

1. *Cause of Action* predicated upon the right of heirs-at-law to claim a resulting trust where a testatrix attempts, by collateral agreement with a devisee evidenced, *inter alia,* by the will itself, to create a trust which fails for uncertainty and noncompliance with the Statute of Wills. See, for instance, Restatement, Trusts, § 54d, § 55h, § 411q.

2. *Defense* predicated upon finality of the probate decree distributing absolutely to the devisee.

3. *Replication* in avoidance of the effect of the decree, that the same was procured by extrinsic fraud.

Such was the true rationale of the issues, notwithstanding the fact that respondents pleaded extrinsic fraud at the outset which was denied by petitioner in his responsive pleadings. It is perfectly obvious, therefore, that the primary right constituting the basis of respondents' cause of action was necessarily their right to have a trust impressed upon petitioner as being the person in possession of property which in equity belonged to them. It is equally obvious that, unless they had possessed such primary right, the question of extrinsic fraud could never have arisen, for if they had possessed no right capable of being violated, respondents could not have been defrauded. It thus becomes manifest that the only function of extrinsic fraud in the case was as a vehicle to avoid whatever effect the decree of distribution had upon the respondents' rights. And it follows that when the Supreme Court, adversely to petitioner's contentions, held that the decree was *not* conclusive, due to want of juris-

diction in the probate court to adjudicate the presence of a resulting trust, the issue of extrinsic fraud became utterly superfluous.

We now propose to show that not only was the issue as to a collateral or secret agreement (evidencing an attempt to create a trust which failed) present in the case from the inception, but that petitioner knew it and attempted to meet the issue, thereby clearly having his day in court.

II.

Petitioner Has Had His Day in Court Upon the Issue of a Collateral or Secret Agreement to Create a Trust and Upon Every Other Issue Involved in the Case, Including That of Extrinsic Fraud.

It will be borne in mind that prior to the trial which resulted in the judgment against petitioner, there had been a previous appeal from a judgment rendered after demurrer sustained to the plaintiff's original complaint. *Sears v. Rule,* 45 Cal. App. (2d) 374; [R. 260-271].

The briefs on that appeal clearly show that the issue of the collateral or secret agreement was directly presented to, and decided by the District Court of Appeal.

The briefs in question consisted of an Appellants' Opening Brief, a Reply Brief filed by petitioner herein, and, after decision of the court sustaining the complaint, a Petition for Rehearing also filed by petitioner. Certified copies of those two briefs and of that petition are collectively filed herein as Respondents' Exhibit "A."

Respondents herein, in their "Plaintiffs' Opening Brief" devoted an entire topic to the identical theory

upon which the judgment herein was later affirmed by the California Supreme Court. On page 95 of that brief (see Exhibit "A" herein) appears the following:

"POINT IV.

"PLAINTIFFS HAVE A CAUSE OF ACTION EVEN IN THE ABSENCE OF MISTAKE OR FRAUD. THE SUIT SHOULD NOT HAVE BEEN DISMISSED.

"Even if the complaint did not allege that the Decree of Distribution was obtained through mistake or extrinsic fraud, the plaintiffs still have a cause of action, and the demurrer should not have been sustained.

The complaint alleges the defendant took the residue charged with a trust; it alleges he has repudiated the trust and claims the entire residue as his own. The intended beneficiaries being unnamed and unknown, equity therefore will decree that he holds it, not for himself, but as trustee for the intestate heirs of the deceased . . ."

Petitioner herein, in his Reply Brief (see Exhibit A, herein), also discussed the secret collateral agreement. He stated:

"No attempt is made to allege a secret trust was intended, or that the plaintiffs were the beneficiaries thereunder, or were secretly named, or that defendant made any promise with respect to such devises or bequests." (Exhibit A, p. 4.)

Pages 19-22 of that brief are devoted to his topic entitled:

"The test for the creation of a secret trust is, First, the intention to create a trust for someone, and, Second, the promise, express or implied, by the legatee to carry it out."

The complaint of course, does allege a secret or collateral agreement.* For instance, Paragraph IX alleges that, as to the residue, petitioner well knew that the said testatrix had in mind other beneficiaries than himself and that he was not the sole beneficiary. [R. 152-153.] Similar allegations appear in Paragraph VI of the cross-complaint of respondent Minnie Cotton. [R. 184-185.] In Paragraph VI of the complaint it is alleged, by reference to the will, that petitioner was made the "sole beneficiary" of the estate to "distribute" it in accordance with the "wishes" of the testatrix "often discussed" by them. The complaint prays that he be held as trustee for the benefit of the heirs at law.

The District Court of Appeal, in its decision [R. 260] stated the following concerning the complaint:

> "The theory that the testatrix . . . intended to convey the residue . . . to him in trust to be distributed in accordance with their previous agreement, seems conclusive . . ." [R. 266.]
>
> "Moreover it is apparent the respondent knew the testratrix did not intend to make him the sole beneficiary of her estate . . ." [R. 267.]

---

*It should be pointed out that *the will itself* evidenced the existence of such an agreement:

"ARTICLE FIVE.

* * * * * * * * * * *

"(b) The reason of making my brother, Charles T. Rule, the sole beneficiary of my estate is that I am confident, and place my trust in him to the extent, that he will distribute my estate in accordance with my wishes he and I have often discussed."

". . . the allegations of the complaint . . . clearly show that it was not the intention that Charles T. Rule should become the sole beneficiary of his sister's will . . ." [R. 270-271.]

Petitioner, in his Petition for Rehearing by the District Court of Appeal (Exhibit A herein), stated:

"V. The court erred in holding that a secret agreement was alleged or existed . . ." (p. 2)

". . . the court has not sought to discover the intention from the language of the will, but from the purported agreement alleged by counsel and referred to as a secret trust in the brief under that heading at pages 46 to 56." (p. 26.)

After his petition for rehearing was denied, petitioner herein filed in the Supreme Court of California a petition for a hearing by that court. (See Vol. 11 herein.) On page 4 of that petition he stated:

"(2) The decision of the District Court is erroneous in that it is predicated upon the court's conclusion that a secret agreement existed between the testatrix and her brother, Charles T. Rule . . ."

The District Court of Appeal reversed, and sent the case back for trial. The following references to the record show that petitioner's counsel were fully aware of the presence of the issue as to a collateral or secret agreement.

For instance petitioner himself admitted the secret trust. He testified in part as follows:

"Q. This will, I presume, Mr. Rule, was drawn for the purpose of trying to carry out the wishes of Sarah Weber? . . . A. Yes."

Q. And you had discussed with your sister, as stated here in the will, what those wishes were? A. Yes." [R. 32-33.]

* * * * * * * *

"Q. Those wishes were only disclosed to you in conversations with your sister? A. Yes, sir, that is correct." [R. 37.]

* * * * * * * *

"A. He (Henry Draeger) told me . . . that my sister had often talked about she wanted me to distribute the estate." [R. 5.]

* * * * * * * *

"The Court: Hadn't Mrs. Weber, before she died, told you about how you should divide that property? A. Yes." [R. 5.]

* * * * * * * *

The petitioner admitted he had, in another action, testified as follows:

"Q. And was any explanation made of the legal effects or legal meaning of any of the phrases used in that will? A. I do not recall at that time. Later Mr. Draeger went into that. . . .

Q. Do you recall what he explained? A. Yes, about the trust.

Q. About everything going to you in trust? A. Yes." [R. 4.]

* * * * * * * *

Edwin Weber, a witness testified:

"A. Oh, I asked him (Mr. Rule) what the instructions of Sarah was to him as to the distribu-

tion of the estate; and he said that that was what he knew and it was nobody else's business." [R. 58.]

* * * * * * * *

Mr. Warren, attorney for petitioner, in addressing the trial court, stated in part:

". . . the Appellate Court said there are some allegations in here there was a secret agreement between this Mr. Rule and Sarah Weber. Now, if there is a secret agreement, the foundation of this whole thing by the decision of this Court is that there existed a secret agreement which was concealed from the court. Now, that would take a conversation between Sarah Weber and Charles T. Rule . . ." [R. 104.]

If any further evidence were needed as to the fact that pettiioner has fully had his day in court upon the question of a collateral agreement as constituting the basis of respondent's right to recover, the following from the findings of the trial court is eloquent [R. 219]:

". . . At the death of Sarah E. Weber, Charles T. Rule knew that Sarah E. Weber did not intend by said will to devise and bequeath the residue of her estate to him absolutely, and he knew that she intended by said will to devise and bequeath the residue of her estate to him in trust only, for the beneficiaries previously agreed upon and understood between herself and Charles T. Rule.

"Prior to her death, Sarah E. Weber discussed each provision of her said will with Charles T. Rule,

and she told him the manner in which she wanted him to distribute the residue of her estate. Charles T. Rule agreed, and told her he would distribute the same in accordance with her said wishes and directions. Sarah E. Weber, when she executed said last will and testament, and at her death, had confidence in Charles T. Rule, and trusted that he would distribute the residue of her estate in accordance with her said wishes, which she had discussed with him, and his agreement with her."

In respondents' brief in the appeal after the trial of the case, we devoted pages 7 to 25, to a discussion of the evidence supporting the finding regarding the secret trust (see Vol. 10 herein).

Petitioner herein, in his opening brief in that appeal, challenged the finding of the trial court and stated at page 94 (see Vol. 10 herein):

". . . the alleged agreement on his part with respect to distribution of the estate was simply non-existent."

Petitioner herein, in his reply brief in the appeal from the judgment, stated the following (see Vol. 10 herein):

"*The existence of non-existence of a collateral agreement* between Mrs. Weber and Mr. Rule by which it was agreed that he was to take the residue of her estate as a trustee and not in his individual right, *is clearly the crux of the issue of fraud on this appeal.*" (Br. p. 24.)

It is also pertinent to add that the foregoing quotation is taken from a section of the brief which is headed:

> "C. There Was No Collateral Agreement or Trust."

It might also be noted that on page 28 of the same brief petitioner has another topic entitled:

> "D. The Evidence Affirmatively Established the Non-existence of Any Collateral Agreement."

under which he said:

> ". . . It is apparent that any evidence of discussions between them was competent and material—not as declarations of the decedent for the purpose of construing her will, for that would be contrary to Section 105, Probate Code—*but as competent evidence to prove or disprove the existence of the collateral agreement which is essential to any possible cause of action of the respondents.*"

On page 11 of the same brief, petitioner herein stated:

> "It thus appears that the alleged fraud falls into two categories, first . . . and, second, the fraud of appellant in . . . concealing his knowledge of an agreement between him and Mrs. Weber to distribute the property according to some previous understanding."

In view of the foregoing uncontrovertible evidence that the existence of a collateral agreement has always been implicit in respondents' recovery, it is submitted that petitioner's claim that the California Supreme Court "sub-

stituted" a new and different theory and cause of action upon which petitioner has never had his day in court is wholly without merit. The basic issue has always been present, and, it was, as petitioner stated in his said reply brief *"the crux of the issue of fraud"* (see Vol. 10 herein). The presence or absence of the issue of extrinsic fraud depended only upon whether petitioner was right or wrong in his contention that the decree of distribution was *res adjudicata.* The California Supreme Court held he was wrong; and it held correctly, as we shall show in our discussion of petitioners' Point 2. But whether its holding in this respect was right or wrong, no question of due process arises, for petitioner has had his day in court *on every issue involved in the case, including the issue of extrinsic fraud.* For this reason we have deemed it unnecessary to discuss the authorities mentioned by petitioner in this connection.

It might be stated in passing, that even if the complaint herein had failed to plead the existence of the secret or collateral agreement, as contended by petitioner, which contention we deny, the assertions of petitioner are still without merit. The issue of the collateral agreement was tried and findings were made with respect thereto, and, as the Court stated in *Martin v. Imbrie,* 262 Fed. 44-47:

> "Effect must therefore be given to the rule that where the parties, with the assent of the court, united in trying a case on the theory that a particular matter is within the issues, that theory cannot be rejected when the case comes up for review."

(See, also to the same effect: *San Juan Light Co. v. Requena,* 224 U. S. 89, 32 Sup. Ct. 399, 56 L. Ed. 680; *Fleishacker v. Blum,* 109 F. (2d) 542, cert. den. 311 U. S. 665; *Lyons v. Empire Fuel Co.,* 262 Fed. 465; *Houle v. Helena Gas & Elec. Co.,* 31 F. (2d) 671; *Bjornquist v. Barton & A. R. Co.,* 250 Fed. 929, cert. den. 248 U. S. 593.) The same rule obtains in California. (*Peck v. Noee,* 154 Cal. 351; 2 Cal. Jur. p. 240, citing many cases.) Section 4½ of Article VI of the Constitution of California provides in part the following:

> "No judgment shall be set aside, or new trial granted in any case, . . . for any error as to any matter of pleading . . . unless, after an examination of the entire case, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

It is also pertinent to add, that, the existence of the secret or collateral agreement having been proved and found, even if the theory of law upon which the California Supreme Court affirmed the judgment differed from that of the trial court, that still petitioner's contention is without merit. It is the long established rule in California, that:

> "If the judgment or order in question is right upon any theory of law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusions."
>
> *Davey v. So. Pacific Co.,* 116 Cal. 325-329;
>
> 2 Cal. Jur., p. 809, citing many cases.

III.

Petitioner Acquired No Vested Rights Under the Decree of Distribution, for the Probate Court Was Without Jurisdiction to Declare the Equities Under Which Respondents Claimed, as Held by the California Supreme Court.

The jurisdiction of the California probate courts stems from the Constitution and laws of that state. (Calif. Const., Art. VI, Sec. 5; California Probate Code, Secs. 300-1242.) And here the highest court of the state has held that the probate court had no jurisdiction to impose a resulting trust upon property passing out of probate. The reasons for this may be simply stated under California law.

It is fundamental California law that *all* questions relating to trusts of whatever nature are, in the absence of statute, solely and exclusively in the jurisdiction of equity. It is equally certain that the jurisdiction of California Superior Courts while sitting in probate has always been in control of the Legislature. And, prior to the enactment in 1889 of Code of Civil Procedure Section 1699 (now Probate Code, Section 1120) those courts, while sitting in probate, *possessed no equity jurisdiction whatsoever*. These matters are too well settled to require the citation of authorities, but we may refer in this connection to *Parkman v. Superior Court*, 77 Cal. App. 321, 323-6; *Estate of Hubbell*, 121 Cal. App. 38, 41-3; *Estate of McLellan*, 8 Cal. (2d) 49, 55-6. As the Supreme Court said in the case last cited:

> "Except for that statute [Probate Code, 1120] the Superior Court would have no authority, in the exer-

cise of its probate jurisdiction, to hear and determine the account presented by a testamentary trustee."

And, as the court held in that case, the equity jurisdiction conferred by that section is only partial and incomplete and is strictly limited by the terms of the statutory grant. In the *Hubbell* case, *supra,* for example, the court held that the Superior Court, while sitting in probate, under Section 1120 has no jurisdiction to terminate a testamentary trust (although a court of equity undoubtedly has that power) because that particular element of equity jurisdiction was not granted by that section.

It is thus clear that the only equity jurisdiction possessed by California courts in probate is that granted to them by Section 1120, which is partial and incomplete and cannot be extended beyond the express terms of the grant. And that jurisdiction is limited in *time,* as well as in extent, by the terms of the grant. By those express terms, it cannot be exercised until *"after distribution."* It is a grant of limited equity jurisdiction over the administration of testamentary trusts, and it cannot be exercised until after distribution to the trustees because until then there is nothing to be administered by them.

> "Sections 1120 and 1121 confer jurisdiction in the Probate Court *after* distribution of the estate, when the trust has been created, exists and *survives the distribution* of the estate." (Emphasis added.)
>
> *Estate of Rey,* 31 Cal. App. (2d) 648, 653 (petition for hearing by Supreme Court denied May 18, 1939).

Accord:

Gillette v. Gillette, 122 Cal. App. 640, 642.

It follows that the Probate Court, being powerless to impress the trust declared in this (equity) case, had no alternative other than to distribute to appellant, the devisee named in the will. And, as was implicit in the holding of the California Supreme Court, the decree was conclusive *only* as to the fact that the legal title to the assets passed to appellant, without affecting in the slightest the right of these respondents to assert their equities in the proper forum.

The result is that, in the eyes of equity, petitioner took the assets, not in his own right, but subject to their being impressed with a trust at the suit of the beneficial owners. As a matter of fact petitioner himself admits the Probate Court lacked the equity jurisdiction to impress the trust. In his appellant's reply brief in the last appeal (2d. Civil No. 14280), he states at page 33 (Vol. 10):

> "As previously stated in this brief, if there was any collateral agreement it was a matter for cognizance by our courts of equity, but it was of no concern whatever to the probate court."

And petitioner in support of the foregoing statement cited the following California cases: *Prior v. Andrews,* 83 Cal. App. 782-789; *Curdy v. Berton,* 79 Cal. 420, 427, and *Lauricella v. Lauricella,* 161 Cal. 61.

Petitioner thus himself admits that he acquired no "vested" right in the assets at all, in the sense in which he uses the term and, hence, once again he has failed to show a constitutional question.

As a subordinate contention under his Point 2, petitioner complains of being compelled to turn over the property to persons not claiming to be beneficiaries, and with-

out inquiry as to the validity and other incidents of the trust. At the same time, at page 29 of his brief, he concedes that under settled usages and modes of procedure he could lawfully be deprived of his rights under the decree:

> "2. Without an attack upon the decree, and proceeding upon the theory that there was a trust created by collateral agreement:
>
> * * * * * * * *
>
> "(b) At the instance of heirs of the decedent upon a judicial determination that such trust created by collateral agreement was invalid."

This, of course, is our case. Restatement, Trusts, Sections 54d, 55h, 411q.* Petitioner asserts, however, that there had been no judicial determination of the invalidity of the trust attempted to be created by collateral agreement, but only as to that attempted to be created by Article Five of the will. He thus ignores entirely the significance of Finding XI quoted above, which clearly indicates that the provision in the will related back directly to, and was merely evidence of, the collateral agreement; and, above all, he most studiously forgets the contention made by him in the District Court of Appeal, namely, that the existence of the collateral agreement which was *essential* to any possible cause of action in the respondents. To

---

*And see, also, Scott on Trusts, Vol. 1, p. 312, where it is said:

> "It has been held that if B agrees to hold in trust for or to convey to some one whose identity is not communicated to B until after A's death, B cannot be compelled to hold for the person intended by A; but since B would be unjustly enriched if he were allowed to keep the property, he will be held as constructive trustee for A's heirs or next of kin."

claim, as petitioner does claim, that the provision in the will is anything other than the collateral agreement in attempted action, amounts to simply refusing to face the facts.

Beyond all this, however, petitioner is in no position to complain of being compelled to turn the assets over to the heirs where the beneficiaries are legally unascertainable. He is not a faithful trustee, seeking to discharge his fiduciary obligations to the beneficiaries. He denies the existence of the trust, and claims in his own right. Under these circumstances, he has no standing to complain that the law, to avoid unjust enrichment on his part, directs that the assets go to the complaining heirs in manner and form as provided in the judgment below. He cannot complain that property which he does not own is awarded to another. (*Estate of Bryant,* 3 Cal. (2d) 70.)

For the reasons hereinabove set forth, it is respectfully urged that the petition for *certiorari* herein be denied.

Respectfully submitted,

PIERCE WORKS,
Counsel for Respondents.

EDWIN J. MILLER,
RALPH W. MILLER,
HOWARD E. FORRESTER,
Of Counsel.